



STATE OF HAWAII  
DEPARTMENT OF TRANSPORTATION  
869 PUNCHBOWL STREET  
HONOLULU, HAWAII 96813-5097

IN REPLY REFER TO:  
DEP-A  
21.0037

September 13, 2021

The Honorable Senator Sharon Y. Moriwaki  
Chair, Senate Special Committee on Procurement  
Hawaii State Capitol Room 223  
415 South Beretania Street  
Honolulu, Hawaii 96813

Dear Senator Moriwaki:

Subject: **Senate Special Accountability Committee on Procurement Informational Briefing Follow-Up Questions**

We are in receipt of your letter dated August 24, 2021, in reference to the above subject. Please see our responses below:

**Training:**

1. **A revised chart (Handout C) on employees with procurement delegation, procurement officer or buyer/purchaser designation, dates of training required for authorization and also include latest refresher or updated training completed.**

Response:

A revised version of Handout C (or HDOT Exhibit A, as it is known inside the department) is attached. This version differs from the original in a few ways that we hope will aid in better understanding it:

For all personnel listed, this version contains a history of prior and current delegations, and form of delegation for the types of procurements listed in each column.

For the listed Delegations via Form SPO-036:

- “Initial” is date of first delegation issued to the listed employee.
- “Rev” is the date of subsequent revision(s) to Form SPO-036 delegations.
- “Current” is most recent SPO-036 delegation in current effect.

This version also contains a history of the relevant training completed by the personnel listed for each type of delegation. The SPO training course listed in each column corresponds to the procurement type, and matches up with the departmental requirement for periodic training:

- “Initial” is date of employee’s first completion of SPO training class listed.
- “Refresher” is subsequent date(s) of completion for periodic re-training.
- “Most Recent” is last date the listed course was completed.

Please note: For the “Exempt from 103D” procurement method, procurement officers with signature authority for all allowable procurements in this category (limited to Deputies) are reflected via SPO-036 delegations. However, there are many employees in other positions with more limited delegations, related to payment type and amount (example: for Utility payments only), per the section headers for that column. These delegations are made via “Reference 1”, which is the HDOT Director’s schedule of Procurement Delegations (most recent version, dated 1/25/2019, is attached), and are delegated this way because the SPO-036 form doesn’t provide a means for making such limited delegations. Thus, an incumbent employee in any of the positions listed in “Reference 1” for the Exempt from 103D procurement method have delegations effective as of completion of the required training course (SPO-125), with those dates for initial and required recurrent training listed as described above.

**2. Explain the procedure and requirements for approving delegated authorization, e.g. some officers have completed training three years prior to authorization (see p. 7-AnaMarie Aiu) and others have been approved prior completing training (see p. 7-Carter Luke).**

Response:

Based on the revised “Handout C” described above, the additional information provided on the range of dates for various delegations and trainings should help make it clear that many HDOT employees who advance to the level of Procurement Officer have prior consecutive service, sometimes at a lower levels of delegation to ‘conduct/participate’ in particular procurement methods, for which they receive initial training and conduct re-training as required by our HDOT departmental policy. On that basis, it should now be more evident that full record of individual delegations and training go ‘hand-in-hand’ over the course of an employee’s career. It should be noted however that the standardized delegation via Form SPO-036 did not come on line until early 2011. Prior to that time, delegations were handled by various executive branch departments in different ways. So some employees with initial training prior to 2011 might appear to have been trained long before the delegation dates listed in Handout C, but were in fact trained and conducting procurement activities under prior delegations that were handled differently. In most cases however, the training vs. delegation record should be more clear with the revised Handout C.

3. **With 161 airports employees with delegated authority, who and how are the procurement staff supervised to ensure compliance with procurement law? Does the Business Management Office monitor training and/or determine whether staff has adequate knowledge? If not, who oversees staff performance? If there are challenges and/or recommendations, please provide.**

Response:

HDOT Airports Division ensures oversight and compliance as follows:

For Maui, Hilo, Kona and Kauai Airports Districts, the District Managers have authority to approve small purchases up to \$15,000.00. The Business Services Supervisor in each District has the responsibility to oversee and ensure compliance with the state's procurement statutes and regulations.

For Oahu Airports District, the District Manager has authority to approve small purchases up to \$50,000.00. The Business Services Supervisor and the Staff Services Supervisor (for Maintenance Section - baseyard personnel) share responsibility to oversee and ensure compliance with the state's procurement statutes and regulations for the Oahu District.

The AIR-AF office (Fiscal Management Staff - Procurement Section) oversees and ensures compliance with the state's procurement statutes and regulations only for purchase amounts that are above the District Manager's signing authority. AIR-AF Procurement also oversees all Purchase Requisitions for the Division's administrative offices.

For any Airports procurement actions that exceed the delegated authorities within the Division and require HDOT Director's signature, these are prepared by the Division and forwarded to HDOT Administrative Division - Program Planning and Budgeting (PPB) Office, to review for DIR signature.

The HDOT Administrative Division Business Management Office (BUS) monitors all delegated procurement authorities for the entire department by maintaining central records of current delegations and completed training courses, review and routing of approved SPO-036 Procurement Delegation forms (for new delegations, revisions, and/or deletions) to the State Procurement Office (SPO), and preparation of memoranda on an annual basis for Director's communications to Divisions about periodic re-training requirements for all HDOT employees with currently delegated procurement authorities.

4. **Within the last three years, how many procurement violations have occurred? Provide the department and/or division procedures for addressing violations of procurement law, specifically the revocation of authorization and/or any other assessment(s) for violations. If procurement authority was not revoked, what corrective action has been taken to address the violation. Also provide the criteria for reinstatement.**

Response:

There were a total of eleven (11) Procurement Violations for the last 3 years (July 2018-present) in HDOT Airports Division. Departmental policy for addressing procurement violations is detailed in Director's memo # DIR 1.10962 "Procurement Training Policy," dated October 24, 2014 (attached), which requires procurement officers and personnel with a Procurement Violation to be retrained in the applicable procurement method within a one (1) month period, and suspends authorization to conduct or participate in the applicable procurement method until the specified retraining has been completed. All eleven of the procurement violations in Airports Division described above were resolved in this manner.

5. **Are the time requirements of ethics and compliance training every three years and mandatory procurement training every five years adequate? If not, provide recommendations.**

Response:

The current departmental policy for re-training in mandatory procurement courses every five (5) years was established in 2014, through DIR Memo #1.10962 (copy attached), in response to State Auditor's office findings and recommendations from 2013. The departmental policy for initial training (and periodic 3-year re-training) in ethics and compliance was established in 2015 by DIR memo #1.11077 (copy attached). These policies remain in effect, and in combination with the additional re-training requirements involved in actual procurement violations, are deemed sufficient by the Department. It should be noted as well that in addition to the formalized and basic types of training provided by SPO courses, there is a considerable amount of ongoing training always underway in HDOT, through the on-the-job experience of those with procurement delegations and their interactions with fellow staff and supervisors in the preparation and approvals process, feedback from internal pre-audits done routinely within the Divisions and by BUS office, and the distribution of updated procurement circulars and other communications from the State Procurement Office when policies, procedures, required forms and other changes related to the state's procurement regulations occur.

**Procurement Procedures:**

6. **Revise the procurement process flow charts to include designing the scope of the project; and the average days for each of the phases from solicitation to contract award**

Response: See attached.

7. **Concerns arise from change orders that include change of the project scope increasing the original cost of the project. Does the department monitor these changes and causes if appropriate, eg. unanticipated construction conditions. Who approves the change orders and what criteria are used.**

Response: Change orders, including the necessity for the changes, are reviewed/approved by the State Project Manager, Section Head, and Engineering Program Manager.

8. **The division indicated that some of the change orders occur due to design error or stakeholder requests. For contracts during the past 3 years, how many contracts required change orders due to (1) design error and (2) stakeholder requests. What were the additional costs of these change orders? Were there change orders that resulted in a change in the scope of work?**

Response: See attached.

9. **Provide recommendations to assess consultants for design error that results in change orders that increase the cost of the project. When professional services are submitted, language at the front-end for deterrence in language of solicitation and then determine how consultants responds**

Response: DOT-Airports previously tried to put language in its contracts that consultants would be responsible for change orders attributed to design errors and omissions. However, consultants were advised by their attorneys not to sign contracts with this type of language.

All architectural and engineering firms will attest that there is no such thing as a set of perfect plans and specifications. Design errors and omissions will occur, with occurrence being dependent on project complexity. Latitude should be allowed for design errors and omissions in line with industry standards not exceeding 5% of the contract bid amount.

Language can be included up front in the solicitation for professional services. However, it is anticipated that 1) consultants would ask to have the language revised, or

2) no consultants (or less than the minimum three consultants) would submit their qualification proposal in response to the solicitation (see Question 12 below).

Recommendations:

1. Design errors and omission language should be a Statewide (through SPO) or a DOT-wide policy, and should not be limited to DOT-Airports only contracts.
2. Revise the boilerplate General Conditions (AG-008) that is included in all DOT professional services contracts. This would be a DOT-wide policy.
3. See Question 12 below.

**10. One of the problems of using the competitive sealed bid procurement is that the award is based on the lowest bid so there can be no consideration of the past performance of the vendor. Is this a challenge to obtaining quality performance on state contracts? What recommendations can you provide to address this problem?**

Response: This is usually not a problem, but there have been a few projects where the low bid contractor could have performed better quality.

We believe that DAGS tried utilizing PIPS, a performance-based procurement system, where contractors were evaluated on past performance and only those contractors who had a satisfactory rating were invited to submit bids on future projects. We believe past performance will always involve some degree of subjectivity that will only lead to protests, which is why contractors objected to PIPS.

Recommendations:

1. Allow alternative procurement methods (through SPO) such as Design-Assist and/or CMAR (CM at Risk).
  - Design-Assist: Allows a contractor to be awarded a contract to work with the designer during the design, then the contractor provides a price to construct.
  - CMAR: Allows the construction management firm to hire a contractor to deliver a project at a guaranteed maximum price.

### **Challenges/Recommendations**

- 11. Allowing captive insurance, while cheaper for the contractor, is not in the best interest of the state. It is recommended that we require a surety bond similar to the federal requirement but the cost of the project would increase. Provide more specific information and recommendations for a policy change in consultation with the Insurance Commissioner.**

Response: Our Department of Transportation – Airports Division management team met with DCCA and the Insurance Commission, and was provided the following information:

The DCCA and the Insurance Commission indicated that they are not familiar with the federal requirements, but since the DCK contract in 2015, they have passed bills that no longer allows insurance companies to qualify through loans back to company insured. They believe this would prevent a similar situation from occurring.

Pursuant to Hawaii Revised Statutes (“HRS”) chapter 431, article 19 and Hawaii Administrative Rules chapter 16-17, a captive insurance company domiciled in the State of Hawaii is permitted to provide surety coverage under a business plan approved by the Insurance Commissioner. Recent statutory and administrative rule changes were adopted to provide enhanced protection for entities and consumers utilizing captive insurers.

HRS §431:19-115 was amended in 2019 to apply Article 15 (Insurers Supervision, Rehabilitation And Liquidation) to all captive insurance companies domiciled in the State of Hawaii. See Act 70, Session Law of Hawaii 2019, section 24. Previously, Article 15 was only applicable to certain classes of captive insurance entities, but now applies to all captives. Article 15, titled Insurers Supervision, Rehabilitation, and Liquidation, protects the interests of the insureds, claimants, creditors, and the public through early detection of potentially dangerous conditions of an insurer, prompt application of appropriate corrective measures, improved methods for rehabilitating insurers, enhanced efficiency and economy of liquidation, equitable apportionment of any unavoidable losses, and facilitating cooperation between states in the liquidation process. Applying Article 15 to all classes of captive entities provides the Insurance Division with enhanced regulatory authority to take action, whether it be supervision, rehabilitation, or liquidation, against all captives that may be financially unstable.

HAR §16-17-17, effective August 17, 2019 establishes additional requirements and conditions for a captive insurance company to provide surety insurance under a business plan approved by the Insurance Commissioner. Additional requirements and conditions include the captive maintaining a ratio no greater than ten to one of the total value of outstanding bond obligations to unimpaired capital and surplus. Intercompany or affiliated loans are considered nonadmitted assets when determining unimpaired capital

and surplus under sections 431:19-104, 431:6-201, and 431:19-110, Hawaii Revised Statutes, unless an irrevocable letter of credit issued by a bank chartered by this State or a member bank of the Federal Reserve System, or other collateral approved by the commissioner, fully secures the loans. Therefore, loanbacks cannot be considered in calculating the minimum capital and surplus requirements and mandatory provisions necessary for a captive insurance company to be financially stable. This rule was implemented to address an incident with a captive entity and to significantly minimize similar incidents from occurring in the future.

The Insurance Commission also mentioned that it would be a department or Airports Division policy whether captive insurance companies would be allowed on their contracts. While existing statutory and administrative rules govern the formation, financial solvency, and activities of captive entities, DOT may require more stringent capital requirements for its projects. Statutes and rules provide a minimum floor ensuring financial soundness of captives, and DOT has the discretion to raise thresholds depending on the scope of a particular project.

- 12. Procurement of professional services (HRS103D-304(g)) requires a minimum of three persons/firms to be ranked by department's selection committee, but the division has faced problems in obtaining three submissions. In these cases, continuing to solicit names is not productive and delays the project. The department recommends waiving the provision and authorizing the director to rank the submissions and proceed with the award. As there was concern raised, the department should work with the SPO and the AG to propose an amendment with safeguards, e.g. allowing after a second request for submissions (since it would require only an additional 30 days).**

Response: Our Department of Transportation – Airports Division management team met with State Procurement Officer (SPO) Bonnie Kahakui. Due to the *Asato v. Procurement Policy Board* (Haw. 2014) case, a statutory change to 103D-304 would be required to reinstate the waiver.

Recommended Statutory change:

§103D-304(g) (g) The selection committee shall rank a minimum of three persons based on the selection criteria and send the ranking to the head of the purchasing agency. If the purchasing agency fails to get a minimum of 3 qualified persons, the agency may submit a request for alternative procurement pursuant to the rules established by the procurement policy board. The contract file shall contain a copy of the summary of qualifications for the ranking of each of the persons provided to the head of the purchasing agency for contract negotiations. If more than one person holds the same qualifications under this section, the selection committee shall rank the persons in a manner that ensures equal distribution of contracts among the persons holding the same

qualifications. The recommendations of the selection committee shall not be overturned without due cause.

- 13. The department has faced situations when it had to deal with emergencies but the SPO has denied the request as the problem could have been prevented. The cost in going through the lengthy process increases due and may lead to more damage not immediately corrected. The department proposes more flexibility regarding emergency procurement under HRS103D-307; and also more expedited review by the SPO in these circumstances. The department proposes to add equipment failure and repairs to protect against further loss or damage, etc. and. replace the SPO approval with report to the legislature. Has the department discussed this with the SPO? Please provide responses from the SPO and recommendations to address the department's needs with safeguarding the fairness and competition standards of the procurement law.**

Response:

Our Department of Transportation – Airports Division management team met with State Procurement Officer (SPO) Bonnie Kahakui in relation to emergency procurement to further discuss the Airports Division's examples mentioned in the hearing relating to the need to replace sheriff law enforcement vehicles and roof leaks. As mentioned, vehicles, especially law enforcement vehicles, are difficult to obtain today due to electronic chip shortages, delaying the manufacturing process. SPO approved the purchase of the sheriff law enforcement vehicles the day after our hearing, and we were able to secure the contract.

We were advised by SPO that we immediately submit all emergency requests once any situation occurs, without delay, especially when it relates to health and safety. SPO generally responds within 24 to 48 hours to all before-the-fact emergency requests or will provide guidance on other methods to utilize.

As a result of the meeting, we do not recommend changes to the Hawaii Revised Statutes, but rather communicate with SPO immediately upon knowledge of the issue requiring SPO's immediate attention.

The Honorable Senator Sharon Y. Moriwaki  
September 13, 2021  
Page 10

DEP-A  
21.0037

Should you have any questions, please contact me at (808) 587-2150.

Sincerely,



JADE T. BUTAY  
Director of Transportation

Attachments

c: Senator Donovan M. Dela Cruz  
Senator Michelle N. Kidani  
Senator Donna Mercado Kim  
Senator Kurt Fevella  
Bonnie Kahakui, SPO Interim Director  
Ross Higashi, Deputy Director, Department of Transportation, Airports Division